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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION SEVEN

THE PEOPLE,

Plaintiff and Respondent,

v.

JASON JEFFREY RETANO,

Defendant and Appellant.

B214172

(Los Angeles County
Super. Ct. No. NA079813)

APPEAL from a judgment of the Superior Court of Los Angeles County, Jesse I. Rodriguez, Judge. Affirmed.

Benjamin Owens, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Stephanie A. Miyoshi and David A. Wildman, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

Defendant Jason Retano appeals from a judgment of conviction entered after a jury trial. Defendant was convicted on two counts of second degree robbery (Pen. Code, § 211). The jury found true the allegation a principal was armed with a firearm in the commission of one robbery (*id.*, § 12022, subd. (a)(1)), and defendant personally used a firearm in the commission of the other (*id.*, § 12022.53, subd. (b)). Following his conviction, the trial court sentenced defendant to state prison for a term of 16 years and 4 months.

On appeal, defendant claims evidentiary and instructional error. We affirm.

FACTS

A. Prosecution

In the span of about 20 minutes during the evening on July 2, 2008, defendant and three juveniles committed the two robberies in Long Beach.

At about 10:30 p.m., Jose Padilla (Padilla) was walking when two men confronted him. One stood in front of him and the other, defendant, stood behind him. A third man stood some distance behind them. The man in front held a knife to Padilla's throat, while defendant held a gun to his ear. The man in front demanded Padilla's backpack. Padilla gave them his backpack containing three books, correspondence and about \$25 to \$30 worth of quarters. Defendant and his companions ran away. Padilla called the police.

At about 10:50 p.m., Long Beach Police Officer Michael Lord responded to a reported robbery. Nicole Williams (Williams) was upset and crying. She told Officer Lord that she had been approached by four or five men, about 20 years old. They took her brown Coach purse and the wallet in her purse. She also said something about a gun. Officer Lord later found paperback books in a trash dumpster and found Williams's purse lying in some weeds next to a wooden fence. He later found her wallet next to a backpack. The wallet matched her purse.

Long Beach Police Officer Martin Romo, on a patrol looking for juveniles violating the 10:00 p.m. curfew, saw defendant and three teenage boys in the vicinity of the robberies. Two of the boys had knives and one had a gun. Defendant did not have a weapon. Defendant had 25 quarters in his possession. One of the boys had 22 quarters, and the other had 30 quarters in his possession.

Later that night, Padilla was taken to view defendant and the three boys. He recognized defendant and one of the boys. He identified defendant as the man with the handgun, and the boy as the one with the knife.

On the next day, Detective Stephen Trentini interviewed defendant. Defendant said that at about 10:00 p.m., he met three of his friends, all juveniles, and they committed several street robberies. Defendant said a handgun and two knives were used.

Defendant described three robberies that his friends committed. The first was of a woman. One of his friends had a gun, and the other two had knives. They took the woman's purse. Defendant indicated that he was standing five to ten feet away from the victim during the robbery.

In the second robbery, a man's cell phone was taken. This robbery was not charged.

In the third robbery, a backpack containing some books was taken from a man. Defendant claimed that he was standing five to ten feet away from the victim at the time.

At the first preliminary hearing, Padilla did not identify defendant because he was "scared" and felt "threatened." At a second preliminary hearing, Padilla identified defendant in court and said he was certain defendant was the gunman.

Officer Romo had 17 years of law enforcement experience and 5 years in the area of juvenile crime. He had been involved in over 2,000 arrests. Over defendant's objection, he testified that it was common for adults to transfer drugs or weapons to juveniles because the consequences for juveniles were comparatively minor.

B. Defense

Defendant testified in his own behalf. He testified that he was present during the robberies but did not participate. He did not hold any weapon the evening of the robberies. He admitted that he and his companions divided up the quarters taken from Padilla.

DISCUSSION

A. Officer Romo's Opinion

Defendant contends that the trial court erred when it admitted Officer Romo's testimony that adults generally give weapons to juveniles after committing crimes because juveniles usually receive a lesser penalty. We disagree.

On direct examination, the prosecutor attempted to question Officer Romo regarding possession of weapons when there is a crime with juveniles and adults. Defense counsel objected based upon a lack of foundation. At a sidebar, the prosecutor indicated that Officer Romo had made over 2,000 arrests and had worked five years in juvenile crime and that many of his arrests involved adults and juveniles. The prosecutor indicated that Officer Romo would testify that "a hundred percent of the time the juveniles end up with the weapons." The reason was that juveniles generally are punished less severely than adults.

Defense counsel complained that he had not obtained discovery about the officer's expertise and stated that it was not 100 percent of the time that the juveniles got the weapons. The prosecutor clarified his previous statement and indicated that it was 100 percent of the time that the loot was shared and 50 percent of the time that the juveniles get the guns.

The trial court overruled the objection, explaining: "I think this is an area that in our business it is common knowledge that quite often the juveniles end up with weapons because, 1, they are treated different. The penalties are extremely different, like night

and day. That may not be common knowledge in every day common parlance or every day knowledge for the average person.

“So I think that for the officer to testify as to his experience in this area, I think that, 1, the People would have to set a foundation, and, 2, he can give us an opinion based on his experiences in this area. [¶] . . . [¶]

“Furthermore, analyzing this on a[n Evidence Code section] 352 analysis, would this be prejudicial to the defendant? It would seem at first glance it would be prejudicial because on the one hand he is alleged to have used a weapon. After that, a juvenile is later found with that weapon or a similar weapon. So on an analysis, it is prejudicial, but I think that the probative value substantially outweighs the prejudicial effect.”

In the presence of the jury, Officer Romo testified that he had spent five years exclusively doing juvenile crime work and had spent an additional ten years on the streets. He further testified that drugs and weapons are transferred in the event that criminals are apprehended. According to Officer Romo, on the night of the robberies, he stopped four men, defendant and three minors, and one of the minors had a gun.

1. Admissibility of Expert Evidence

Only relevant evidence is admissible at trial. (Evid. Code, § 350.) Relevant evidence is that which has “any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action.” (*Id.*, § 210.) The trial court has the duty to determine the relevance and thus the admissibility of evidence before it can be admitted. (*Id.*, §§ 400, 402.) The trial court is vested with wide discretion in performing this duty. (*People v. Waidla* (2000) 22 Cal.4th 690, 717.) We will not disturb the trial court’s exercise of its discretion on appeal unless the court has abused its discretion (*ibid.*), i.e., if its decision exceeds the bounds of reason. (*People v. DeSantis* (1992) 2 Cal.4th 1198, 1226.)

The trial court properly allowed the testimony of Officer Romo as an expert witness. Evidence Code section 801 allows testimony in the form of an opinion if the subject is sufficiently beyond common experience and the opinion of the expert would

assist the trier of fact. The pertinent question in allowing expert testimony and expert opinion is whether, even if the jurors have some knowledge of the subject matter, the expert testimony would assist them. (*People v. Lindberg* (2008) 45 Cal.4th 1, 45.) It is certainly reasonable to find that the jurors would not have sufficient knowledge about the practices of adults and juveniles when they jointly commit crimes, and that Officer Romo's testimony on the subject would be of assistance.

Defendant cites a number of cases in an attempt to show that Officer Romo's testimony was impermissible profile evidence. We find these cases to be distinguishable.

In *People v. Martinez* (1992) 10 Cal.App.4th 1001, the trial court erred in admitting expert opinion evidence on how auto theft rings operate. The court explained: "Here we agree that although the evidence was not characterized per se as a 'profile,' the clear thrust of the evidence was to establish that defendant 'fit' a certain 'profile.' The evidence showed (1) the car he was driving was similar to many other stolen vehicles being transported to Central America[;] (2) his selection of a route (Interstate 10) was similar to that used by many other drivers of stolen vehicles transporting vehicles to that area; (3) the time of his travel was similar to that of many other drivers of stolen vehicles; (4) the false documents he was carrying were similar to false documents found on other drivers of stolen vehicles; and (5) his denial of knowledge and his claim that he bought the car on a street corner was similar to the stories given by many other drivers of stolen vehicles." (*Id.* at p. 1006.)

In the instant case, Officer Romo's testimony was not used to show that defendant fit the profile of a criminal and therefore he was guilty of the crimes charged. Rather, it was used to explain an inconsistency in the evidence—why the gun was found in the possession of one of the juveniles when Padilla testified that defendant used the gun in the robbery.

Likewise, *People v. Robbie* (2001) 92 Cal.App.4th 1075 is distinguishable. In *Robbie*, the trial court erred in allowing expert testimony in a case involving prosecution of a defendant for kidnapping a 16-year-old girl for sexual purposes. The expert in *Robbie* testified that it was common for offenders to: (1) engage in small talk with their

victims; (2) to acquiesce to the victim's request not to have sexual intercourse and to negotiate with her regarding other sex acts; (3) to return the victim to her neighborhood and ask questions about her life; and (4) to compliment the victim. (*Id.* at p. 1082.) Even though the evidence was never characterized as such, it was inadmissible profile evidence. The effect of the testimony was not to help the jury objectively evaluate the prosecution's evidence, but to guide the jury to the conclusion that defendant was guilty because he fit a certain profile. (*Id.* at p. 1085.)

In the present case, the expert did not describe the characteristics of someone committing robberies in order to prove defendant guilty of the crimes charged. Rather, the expert's testimony was intended to help the jury evaluate the evidence presented. The trial court therefore did not abuse its discretion in finding it admissible. (*People v. Lindberg, supra*, 45 Cal.4th at p. 45.)

2. Discretion to Exclude

Defendant also contends Officer Romo's opinion testimony should have been excluded as more prejudicial than probative.

Evidence Code section 352 gives the trial court the discretion to exclude evidence if the probative value of the evidence is substantially outweighed by the probability its admission will create a substantial danger of undue prejudice, confusing the issues or misleading the jury. (*People v. DeSantis, supra*, 2 Cal.4th at p. 1226.) In this context, evidence is unduly prejudicial if it "uniquely tends to evoke an emotional bias against defendant as an individual and which has very little effect on the issues." (*People v. Yu* (1983) 143 Cal.App.3d 358, 377.)

In ruling on the proffered testimony, the trial court allowed counsel to set forth their positions and then ruled. The decision was certainly not made in an arbitrary, capricious or patently absurd manner that resulted in a miscarriage of justice. (*People v. Williams* (2008) 43 Cal.4th 584, 634-635.) Additionally, evidence that adult defendants often give weapons to juvenile accomplices, who receive lesser punishment for weapons possession, was not so sensational or inflammatory as to evoke an emotional bias against

defendant. We therefore cannot say that the trial court abused its discretion in refusing to exclude the evidence. (*People v. Ramirez* (2006) 39 Cal.4th 398, 453.)

Moreover, even if the evidence had been excluded (*People v. Lindberg, supra*, 45 Cal.4th at p. 26), it is not likely defendant would have obtained a more favorable result. (*People v. Partida* (2005) 37 Cal.4th 428, 439; *People v. Watson* (1956) 46 Cal.2d 818, 836.) At trial, Padilla positively identified defendant as the individual who had held a gun to his head throughout the robbery. Padilla had also identified defendant the night of the robbery. Defendant also admitted the facts of the robberies when interviewed by the police, although minimizing his own conduct. There was evidence that the participants had shared the proceeds of the Padilla robbery. In light of this evidence, that the gun was not in defendant's possession at the time of his arrest would not disprove defendant's participation in the robbery or use of the gun. It is not reasonably probable defendant would have been acquitted had Officer Romo's expert testimony been excluded. (*Partida, supra*, at p. 439; *Watson, supra*, at p. 836.)

B. Instructional Error

The trial court instructed the jury pursuant to CALJIC No. 2.90, without objection, that "[a] defendant in a criminal action is presumed to be innocent until the contrary is proved, and in case of a reasonable doubt whether his guilt is satisfactorily shown, he is entitled to a verdict of not guilty. This presumption places upon the People the burden of proving him guilty beyond a reasonable doubt."

Defendant argues that because the People have the burden of proving each element of the crimes charged beyond a reasonable doubt, before a conviction may be secured, the People must prove each element of each charged offense beyond a reasonable doubt. Defendant contends that the instructions as a whole must convey the state's burden to the jury, and it did not happen in the instant case. We disagree.

As the People point out, "instructions are not considered in isolation. Whether instructions are correct and adequate is determined by consideration of the entire charge to the jury." (*People v. Holt* (1997) 15 Cal.4th 619, 677.) When the entire charge to the

jury in the instant case is considered, it is clear that the trial court instructed the jury that the People have the burden of proving each and every element of the charged offense and special allegations beyond a reasonable doubt. Jurors are presumed intelligent and capable of correlating the instructions given them. (*People v. Yoder* (1979) 100 Cal.App.3d 333, 338.)

CALJIC No. 9.40 instructed the jury on the elements of robbery and the trial court told the jury that “to prove” defendant guilty of this crime, “each of the following elements must be proved,” and then listed the elements. CALJIC No. 17.15 instructed the jury regarding the principal armed allegation, telling the jury that, if it found defendant guilty of robbery, it had to “determine whether a principal in that crime was armed with a firearm at the time of the commission . . . of the crime.” The instruction indicated: “The People have the burden of proving the truth of this allegation. If you have reasonable doubt that it is true, you must find it to be not true.”

CALJIC No. 17.19 instructed the jury regarding the personal use allegation, telling the jury that, if it found defendant guilty of robbery, it had to “determine whether the defendant personally used a firearm in the commission of [the crime].” The instruction indicated: “The People have the burden of proving the truth of this allegation. If you have a reasonable doubt that it is true, you must find it to be not true.”

Read together, the instructions informed the jury that the People had the burden of proving each and every element of the charged offenses and special allegations beyond a reasonable doubt. There was no error in instructing the jury with CALJIC No. 2.90 without adding that the People’s burden was to prove each and every element of the charged offenses and special allegations beyond a reasonable doubt.

The cases relied upon by defendant are inapposite. In *People v. Crawford* (1997) 58 Cal.App.4th 815, 819-820 and *People v. Vann* (1974) 12 Cal.3d 220, 225-226, *no* instruction defining reasonable doubt was given. In the instant case, CALJIC No. 2.90 defining reasonable doubt was given.

In *People v. Ramos* (2008) 163 Cal.App.4th 1082, the appellate court did not find error, holding that in light of the instructions as a whole, CALCRIM No. 220 adequately

explained the applicable law. In *Ramos*, as in the instant case, the trial court “went on to enumerate each of the elements of the charged crime and the special allegation, and stated that the People were obligated to prove each of [the] elements in order for [the] defendant to be found guilty.” (*Id.* at pp. 1088-1089, fn. omitted.)

While it is true that the jury instructions given did not include the phrase in CALCRIM No. 220 [“[w]henver I tell you the People must prove something, I mean they must prove it beyond a reasonable doubt”], the court in *Ramos* did not hold that this phrase was determinative of its conclusion. It stated that it was but one fact to be assessed in viewing the instructions “as a whole.” (*People v. Ramos, supra*, 163 Cal.App.4th at p. 1089.)

DISPOSITION

The judgment is affirmed.

JACKSON, J.

We concur:

PERLUSS, P. J.

WOODS, J.